Supreme Court, U.S.
FILED
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(2)

No. 04-671

IN THE
Supreme Court of the United States

VanGuilder v. USA and NY

Petitioner's Supplemental Brief and Consent to *Amicus* Brief Rules 15.8, 18.10 and 37.2(a)

To the U.S. Court of Appeals, District of Columbia And to the New York State Court of Appeals

Edward VanGuilder, *pro se*
241 Fox Road
N. Granville, NY 12854
(518) 642-2448

NEW MATTERS

(1). The NYSC held *Oneida Indian Nation v. County of Oneida*, 44 US 661 (1974) (Oneida I) enlarged or confirmed the enlargement of the federal jurisdiction from the preemption right of purchase, to the plenary jurisdiction to take without Indian consent and accordingly dismissed the show cause application on the ground of non-compliance with federal statute law: **Appendix, 10b**. I appealed on the ground of the conflict with the pre-1871 constitutional law. **Appendix, 12b**. The NYCA invited additional argument: **Appendix, 17b**. I complied. **Appendix, 19b**.

(2). Kanion'ke:haka (People of the Flint or Mohawk) Kaianereh'ko:wa (Great Law) Kanon'ses:neh (Longhouse) moved to file a bill of complaint and an *amicus* brief bearing upon the constitutional question in my petition for *certiorari* 04-671.

(3). A state-wide fraud-in-progress has since come to my knowledge. The perpetrators are the federal and state governments, a set of federally-organized Iroquoian bodies politic subject as

such to federal law on both sides of the USA's border with Canada, a Christianized dissenting group passing itself off as the aboriginal Longhouse government of the Iroquois, and casino promoters. These have colluded and connived to suborn a U.S. District Court into a *per incuriam* finding that both indigenous linguistic families of New York—the Algonkian-speaking Mahicans and the Iroquoian-speaking Six Nations—consented to the "7 Nations Treaty of 1796." The 7th was Abenaki which had no right to cede the Mahican interest in New York, being from Vermont and northwards. The Iroquoian Christian sect at the 1796 event similarly had, and still has no aboriginal interest. Prompted by the fraudulently-induced interim judicial finding that the aboriginal interest was "subject to" federal law, the new fraudulent Treaty is poised to ratify the previous fraudulent Treaty. The new Treaty has been promoted to the Indians as being without prejudice to their aboriginal rights, and to the federal and state governments as finally dispositive of those same rights. The intent is to induce the U.S. Senate to ratify the fraudulently induced Indian consent. The per-

petrators will then rest secure in the apparent impenetrability and durability of the oxymoron identified by Thomas, J.; namely, that Indian sovereignty exists under and therefore is subject to domestic law, rather than the other way round as established in the constitutional era 1633-1871.

CONSENT AND MOTION

Therefore I hereby consent to the application of the *amicus* to intervene and, correspondingly, I seek leave to amend my petition's prayer for relief, to ask this Court to accept my pleadings below for trial under Art. III, §2, rather than to remit them to either or both the USDC and the NYSC under Art. III, §1 as previously requested.

BRIEF

(1). I plead and rely upon the principle of equity *Fraud Vitiates All*.

(2). Before the above new matters came to light I thought that as a matter of *stare decisis* law alone *Cherokee Nation v. Georgia*

of 1831 ("domestic dependent nations") (**Petition, 9a**) precluded the finding by this Court in *Scott v. Sandford,* 19 How. 393 (1857) (**Petition, 15a**) and by Thomas, J., in *Lara* (2004) (**Petition, ii**) that the Indian nations are in any sense "foreign."

(3). Now I see merit in the *amicus' stare decisis* submission that *Cherokee* in 1831 may be read "subject to" *Johnson v. McIntosh,* 8 Wheat. 543 (1823) (**Petition, 8a**) which declared the Indian interest to be "a legal as well as a just claim." As a legal right it must be given a legal remedy. *Cherokee* was based upon this Court's trust the ordinary courts were capable of doing that giving, in spite of the arguable institutional conflict of interest. If *Johnson v. McIntosh* (1823)>*Cherokee Nation v. Georgia* (1831)>*Scott v. Sandford* (1857) (**Petition, 15a**); then *Worcester v. Georgia* (1832) (**Petition, 10a**) arguably tips the balance. It held, in overview, that the constitution did not "enlarge" federal jurisdiction from preemptive to plenary. And therefore when the full jurispruden-

tial accounting is taken this Court may find the *Cherokee* precedent is offset and neutralized by the greater judicial duty to uphold the rule of law safe against the undermining influence of money, politics and *force majeure*.

(4). It is important that this Court resolve the constitutional question of law alone:—of whether the federal jurisdiction is the constitutionally circumscribed preemption power of purchase by treaty with the genuine consent to sell of the authentic aboriginal Indian government still in occupation;—or, alternatively, whether the previously established constitutional jurisdiction of preemption has been enlarged to "sovereign" (*i.e.*, "plenary") status.

(5). All other possible issues (*e.g.*, subject matter jurisdiction, *locus standi* and the relevance and admissibility of evidence) depend upon this threshold issue of the identity of the governing law, be it constitutional or federal. Thomas, J., in *Lara* said (**Petition, ii**) on April 19, 2004:

But until we begin to analyze these questions honestly and rigorously, the confusion that I have identified will continue to haunt our cases.

(6). I would respectfully add that it is not just "our cases" but the whole constitutional negotiated settlement process of purchase by treaty that continues to be "haunted" by the unconstitutional assumption that the federal government can conspire with the states and private interests to thwart the constitutional law.

December 8, 2004. **Respectfully submitted,**

/s/
Edward VanGuilder

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No. 04-5220

IN THE UNITED STATES COURT OF APPEALS
FOR THE DISTRICT OF COLUMBIA CIRCUIT

Edward VanGuilder,

Appellant,

v.

United States of America,

Appellee.

MOTION FOR SUMMARY AFFIRMANCE

The United States herby moves for summary affirmance of the district court's judgment. Summary affirmance is warranted because, as explained below, the district court's judgment is clearly correct and no benefit will be gained from further briefing and argument. *See Egan v. United States Agency for International Development*, ___F.3d___, 2004 WL 1924378 (D.C. Cir. Aug. 31, 2004); *Taxpayers Watchdog, Inc., v. Stanley*, 819 F.2d 294 (D.C. Cir. 1987).

1. Background

This case involves a claim of aboriginal title to certain lands in New York State. In a complaint filed September 15, 2003, (copy attached), plaintiff-Appellant Edward VanGuilder, appearing *pro se*, brought suit against the United States. VanGuilder alleged jurisdiction under 28

U.S.C. 1331, 1343(a)(3) and (4), 1345, 1362, 1391(b), 2201, and 2202 Compl. ¶1. He claimed to have "inherited the Mahican aboriginal title to the reservation in the Indian treaty of April 25, 1724, and to Governor's Island" (Compl. ¶2), and sought a declaration "ejecting adverse possessors from the territory." Compl., prayer for relief at ¶(c). He also sought a declaration that "the defendant's constitutional right of preemption is all the defendant has, and correspondingly its constituents can have, pending the defendant's purchase of the plaintiff's aboriginal title." Compl., prayer for relief at (a)).

VanGuilder moved for summary judgment and the United States moved to dismiss for lack of jurisdiction. In a memorandum opinion and final judgment entered June 4, 2004, the district court (the Honorable James Robertson) granted the government's motion to dismiss. The court held that none of the provisions cited by VanGuilder as a basis for jurisdiction provided the necessary waiver of sovereign immunity. Slip. op at 2. In addition, the court held that while the Quiet Title Act ("QTA"), 28 U.S.C.2409a, provides "the only plausible means of access to federal court" in a case such as this, VanGuilder could not make out a valid claim under that statute because, among other things, VanGuilder did not, and apparently cannot, allege that the United States claims any title or interest in that lands at issue, as required by the QTA. 28 U.S.C. 2409a(d). Slip op. at 2-3.

This appeal followed.

2. Standard of review

This Court's review of the grant of a motion to dismiss is *de novo*. *Wilson v. Pena*, 79 F.3d 154, 160 n. 1 (D.C. Cir. 1996). In ruling on a motion to dismiss, the district court must draw all reasonable inferences in favor for

the plaintiff, and must not dismiss the compliant unless it appears beyond doubt that the plaintiff can prove no set of facts in support of its claim that would entitle it to relief. *Mountain States Legal Foundation v. Bush*, 306 F.3d 1132, 1134 (D.C. Cir. 2002) (citing additional cases). Nevertheless, the burden of establishing jurisdiction is on the party asserting it. *Kokkonen v. Guardian Life Ins. Co. of America*, 511 U.S. 375, 377 (1994). Furthermore, "the court need not accept inferences drawn by plaintiffs if such inferences are unsupported by the facts set out in the complaint. Nor must the court accept legal conclusions cast in the form of factual allegations." *Mountain States*, 306 F.3d at 1134-35 (*quoting Kowal v. MCI Communications Corp.*, 16 F.3d 1271, 1276 (D.C. Cir. 1994)).

Summary affirmance is appropriate where the appellee demonstrates that the merits of it's claims are so clear as to justify expedited action. *Egan v. United States Agency for International Development*, ___F.3d___, 2004 WL 1924378 (D.C. Cir. Aug. 31, 2004).

3. The district court correctly concluded that there is no applicable waiver of sovereign immunity.

The district court held VanGuilder had failed to satisfy his burden of establishing the existence of the requisite waiver of sovereign immunity. A review of each of the provisions relied on by VanGuilder confirms that this is the case:

-- 28 U.S.C. 1331 is a general grant of federal question subject matter jurisdiction. Where the United States is the defendant, federal subject matter jurisdiction is not enough; there must also be a statutory cause of action through which Congress has waived sovereign immunity. See *Industrial Workers of the World v. Clark*, 385 F.2d 687, 693 n. 10

("general grants of judicial jurisdiction are not usually construed as consent to suit."). Section 1331 does not by itself waive sovereign immunity. *Swan v. Clinton*, 100 F.3d 973, 981 (D.C. Cir. 1996); *Neighbors for Rational Development, Inc. v. Norton*, 379 F.3d 945, 960-61 (10th Cir. 2004); *Berman v. United States*, 264 F. 3d 16, 20 (1st Cir. 2001)

-- 28 U.S.C. 1343(a)(3) and (4) provide for jurisdiction in the federal courts in certain civil rights cases. Like 28 U.S.C 1331, section 1343 is a general grant of jurisdiction, not a waiver of sovereign immunity. *Salazar v. Heckler*, 787 F.2d 527, 529-30 (10th Cir. 1986) (citing additional cases).[1]

-- 28 U.S.C. 1345 grants the district court jurisdiction over certain actions brought by the United States. Thus, it does not provide the necessary waiver of sovereign immunity, and is irrelevant to VanGuilder's claim.

-- 28 U.S.C. 1362 grants the district courts jurisdiction over certain civil actions brought by "any Indian tribe or band with a governing body duly recognized by the Secretary of the Interior [.]" This section too is merely a grant of jurisdiction and not a waiver of the United States' sovereign immunity. *Assiniboine and Sioux Tribes v. Board of Oil and Gas Conservation*, 792 F.2d 782, 792 (9th Cir. 1986). Further, the provision applies only to federally recognized Indian tribes; it does not apply to individual plaintiffs like VanGuilder. *See, e.g., Quinault Tribe of Indians v. Gallagher*, 368 F.2d 648, 656 (9th Cir 1966).

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[1] Moreover, section 1343 is not even applicable to VanGuilder's claim. Section 1343(a)(3) only applies to claims to redress deprivations "under color of any State law," and section 1343(a)(4) applies by its terms only to actions "under any Act of Congress providing for the protection of the civil rights, including the right to vote".

-- 28 U.S.C. 1391 establishes federal court venue; it does not address jurisdiction or the waiver of sovereign immunity.

-- Finally, 28 U.S.C. 2201 and 2202 are the Declaratory Judgment Act. That act is not an independent source of jurisdiction, and does not waive the United States' sovereign immunity. *Jarret v. Resor*, 426 F.2d 213, 216 (9th Cir. 1970).

In sum, the district court was correct in holding that none of the statutes cited by VanGuilder waives the United States' sovereign immunity.

4. The district court correctly concluded that VanGuilder cannot claim under the Quiet Title Act.

The QTA provides the "excusive means by which adverse claimants may challenge the United States' title to real property." *Block v. North Dakota*, 461 U.S. 273, 286 (1983). While VanGuilder did not raise the QTA, the district court considered whether VanGuilder might have a claim under QTA, and concluded that he did not. Slip op. at 2-3. That conclusion is plainly correct. The QTA waives that United States' sovereign immunity only with respect to claims involving "real property in which the Unites States claims an interest." 28 U.S.C. 2409a(a). A plaintiff seeking to assert a claim under the QTA must "set forth with particularly * * * the right, title or interest claimed by the United States." 28 U.S.C. 2409a(d). Here, VanGuilder did not allege that the United States has any interest in the lands at issue. To the contrary, he alleged "adverse possession" by virtue of the State of New York's "application of the state's domestic law...." Compl., ¶(3). This defect is fatal to any QTA claim.

CONCLUSION

For the foregoing reasons, the judgment of the district court should be summarily affirmed.

Respectfully submitted,

/s/

MARK R. HAAG
Attorney, Department of justice
Environment & Natural Resources Division
P.O. Box 23795, L'Enfant Station
Washington, D.C. 20026
(202) 514-5391

September, 2004
90-1-0-11083

[Note: Document undated. Certificate of service suggests execution date was September 23, 2004.]

United States Court of Appeals
FOR THE DISTRICT OF COLUMBIA CIRCUIT

Between:	)
Edward VanGuilder,	)
Appellant,	)
and:	) File No. 04–5220
United States of America,	)
Appellee.	)

VanGuilder's Amended Opposition TO USA'S Motion for Summary Affirmance

The USA's motion willfully blindsides the same constitutional law legislation and precedents as did the District Court in its judgment dated June 4, 2004, and as did the Court of Appeals in its judgment dated August 25, 2004. That law dictates the same constitutional answer as that provided by Thomas, J., in *Lara v. USA*, 541 US (2004): there simply is no constitutional justification for the application of federal legislation (such as the QTA in the opposed motion) to the territory in question. That law establishes that the Amerindian race, the black race descended from slaves, and the white race subsuming all other non-indigenous Americans, have racially-fixed constitutional rights and liabilities until constitutionally amended. *Scott v. Sandford*, 19 How. 393 (1857). Correspondingly the government of the USA is not and can not possibly be "sovereign" vis-à-vis the Indian race upon yet-unpurchased territory; precisely because, the government enjoys a constitutionally delimited jurisdiction to purchase. *Expressio unius personae vel rei, est exclusio alterius.* "The people" alone are sovereign, and they have expressed their sovereignty by the written but willfully blindsided constitutional law that

conflicts with the QTA and all other federal legislation in terms of application to unpurchased territory.

Accompanying please find Decision and Order of Supreme Court of New York dated October 29, 2004, Notice of & Case on Appeal dated November 12, 2004, and Petition for Certiorari dated November 5, 2004. My submission in relation thereto is, comity requires this U.S. Court of Appeals for the District of Columbia to assist the Supreme Court of the United States and the Court of Appeals of New York by giving reasons for judgment which deal overtly with the constitutional question and the Catch-22 whereby both the Federal and the State Court Systems evade jurisdiction by attributing jurisdiction to the other.
November 12, 2004.

/s/
Edward VanGuilder

STATE OF NEW YORK
SUPREME COURT COUNTY OF WASHINGTON

EDWARD VANGUILDER,

Plaintiff,

DECISION AND ORDER

-against-

RJI No. 57-1-2002-0300
Index No. 6079

THE STATE OF NEW YORK,

Defendant.

Appearances:
Edward VanGuilder, Plaintiff, Pro se.

KROGMANN, J.

Application for an Order to Show Cause filed by Plaintiff, Pro Se.

The plaintiff has filed with this Court an "Application for an Order to Show Cause". Annexed thereto along with other filings is found a document entitled "Claim" wherein it appears that the plaintiff is seeking a determination that as a matter of Constitutional Law, the defendant's Constitutional interest in and to the Hudson River drainage basin is subject to Mahican title and therefore vests in the plaintiff.

Upon due consideration of the foregoing and a full review of the additional filing made by the plaintiff who appears pro se in response to the requests of the Court, the plaintiff's Application for an Order to Show Cause is de-

nied based upon a lack of jurisdiction and a failure to state a claim upon which relief may be granted.

With the adoption of the Constitution, Indian relations became the exclusive province of federal law. Oneida Indian Nation v. County of Oneida, 44 US 661 (1974) (Oneida I). It is well established that Indians have a federal common law right to sue to enforce their aboriginal land rights, but such determinations are a matter for the federal courts. In addition, the plaintiff has failed to establish his statutory standing to assert the rights under his "Claim."

The within constitutes the Decision and Order of this Court.

DATED: October 29, 2004

/s/

HON. DAVID B. KROGMANN
JUSTICE OF THE SUPREME COURT

The Court is filing the original decision and order together with the original papers in the appropriate County Clerk's Office.

Distribution:
Edward VanGuilder, Pro Se

File No.

IN THE NEW YORK COURT OF APPEALS
On Appeal from the Supreme Court of New York

	)	*Pro Se* and *Sua Sponte*
Between:	)	
Edward VanGuilder,	)	
APPELLANT,	)	NOTICE OF &
(Plaintiff),	)	CASE ON APPEAL &
Applicant,	)	MOTION
and:	)	
State of New York,	)	Index No.: 6079/2004
APPELLEE,	)	County: Washington
(Defendant),	)	
Respondent.	)	
	)	

(i) This Appeal to the Court of Appeals is being made *pro se* by me Edward VanGuilder as of right pursuant to CPLR 5061(b)(2) and 5512(a) against the attached Decision and Order of the Supreme Court of New York (Washington County) dated October 29, 2004, finally disposing of my show cause application and therefore the *lis* which is restricted to contesting the point of constitutional law settled upon by Krogmann, J., as his basis for disposition.

The return date is to be assigned pursuant to the *sua sponte* procedure which arguably exists for the timely resolution of final dispositions based upon questions of law alone.

(ii) The question presented to the Court of Appeals for review is presented at pp. **(i)** and **(ii)** of the accompanying **Petition for *Certiorari*** dated November 5, 2004. Krogmann, J., purported to refute Thomas, J., in *Lara v. U.S.*, 541 US _____(2004) and the constitutional legislation and precedents reproduced at **pp. 6a-21a**.

(iii) The error of law in the court below is manifest on the face of the record. As anticipated in the said **Petition at p. 4** the alternative to court delay to frustrate the *prima facie* Indian constitutional jurisdiction established at **pp. 6a-21a** is the *per incuriam* leading case in support of the pretense that Federal Law overrides conflicting Constitutional Law:—*Oneida Indian Nation v. County of Oneida*, 44 US 661 (1974) (Oneida I).

For the **Petition**'s reasons at **pp. 4-5** Judge Krogmann's reasons at **page 10b, *infra***, misapprehended the nature of the rule of law:—he held a later Supreme Court case in 1974 overruled the earlier (**Petition pp. 6a-21a**) constitutional law rather than the other way round. *Scott v. Sandford*, 19 How. 393 (1857).

(iv) The Court of Appeals has jurisdiction pursuant to CPLR 5061(b)(2).

(v) Since the U.S. District Court has declined jurisdiction as a statutory court the Hon. Clerk of this Court and this

Court itself have no discretion to refuse this case for review to provide a remedy to give legal force and effect to the said previously established constitutional legislation and precedents at **pp. 6a-21a.** This is a necessary implication of the State court system having inherent, original, general and residual jurisdiction. Otherwise the combined neglect of both the Federal and the State court systems *de facto* to provide a remedy is tantamount to a *de jure* repeal of a constitutional jurisdiction. Where there is a right there is a remedy and, correspondingly, where there is no remedy there is no right. But there *is* a right, namely the Indian constitutional jurisdiction about which this Court has held **(Petition p. 19a)**:

Fellows v. Denniston, 23 NY 420, 423, 428, 431 (CA)(1861). **The nature of the aboriginal title, and that of the State within which the lands lie, has been so often defined by judicial determination that no time need now be spent on it. (*Johnson v. McIntosh,* 8 Wheat., 543; *Fellows v. Ellsworth,* 6 Hill, 546; S.C., 5 Denio, 528.) The Indian nation, in a collective or national capacity, has the right of occupancy of the land, but no power to sell or in any way dispose of it to others, except to the State, or to persons authorized by it to purchase; and the government of the State has the ultimate right of the soil, or title in fee simple, subject to the Indian right of occupancy. The right to purchase the Indian claim, or, in the language usually employed, to extinguish the Indian title, thus existing in the State or in its grantees, is usually called the right of preemption....If the purchaser acquires no right to interfere with the Indian occupancy, the subject of his purchase**

is limited to the title of the grantees under the State of Massachusetts; and he acquires nothing more. This, we have seen, is the right of preemption, and perhaps it embraces also a technical fee; but, as it does not embrace the Indian right of occupancy, but expressly excludes it, and that is the only right which the Indians had, it is clear that they are not prejudiced by the tax or by any sale which may take place pursuant to it. The title of the grantees under Massachusetts to these lands, before the extinguishment of the Indian title, subject as it was to the right of possession remaining in the Indians for an indefinite period, was not liable to taxation and sale under the general laws of the State relative to the assessment of taxes.... Each of the three Constitutions successively adopted by the people of the State has contained a provision like that in the first Constitution, which was in these words: "No contracts or purchases for the sale of lands made since the 14th day of October, A.D. 1775, or which may be hereafter made with or of the said Indians, within the limits of this State, shall be binding on the said Indians, or be deemed valid, unless made either under the authority and with the consent of the Legislature of this State."

(vi) Please expedite pursuant to Rule 500.5(d).

(vii) Please Clerk to requisition originals pursuant to Rule 500(a)(1).

(viii) This notice of appeal constitutes the entirety of the case on appeal inclusive of the brief on appeal. Correspondingly I hereby waive oral argument pursuant to Rule 500.5(d)(3).

(ix) Leave from further involvement is requested by me.

The names and addresses of those upon whom these papers were served are:

- Solicitor General, State of New York, The Capitol, Albany, N.Y. 12224
- Attorney General, State of New York, The Capitol, Albany, N.Y. 12224-0341
- Solicitor General, United States of America, Room 5614, Department of Justice, 950 Pennsylvania Avenue, NW, Washington, DC 20530-0001
- Attorney General, United States of America, c/o Counsel Mark Haag, Appellate Section, Environment and Natural Resources Division, U.S. Dept. of Justice, Box 7397 – L'Enfant Plaza Station, Washington, D.C. 20026

CONCLUSION

The above Notice of & Case on Appeal is hereby Certified Complete and Submitted for Final Disposition this 12th day of November, 2004.

s/_____

Edward VanGuilder, (*pro se*)

State of New York

Court of Appeals

Stuart M. Cohen
Clerk of the Court

Clerk's Office
Albany, New York 12207-1095

December 1, 2004

Mr. Edward VanGuilder
P.O. Box 139
North Granville, New York 12854

Dear Mr. VanGuilder:

The Court has received your Rule 500.2 jurisdictional statement and will examine its subject matter jurisdiction sua sponte with respect to whether the order appealed from finally determines the action within the meaning of the Constitution, and whether any jurisdictional basis exists for a direct appeal as of right from an order of Supreme Court. This examination of jurisdiction shall not preclude the Court from addressing any jurisdictional concerns in the future.

This communication is without prejudice to any motion any party may wish to make. If you conclude that the order is not appealable as of right, please arrange for the execution of a stipulation signed by all counsel consenting to a dismissal of the appeal (see section 500.16 of the Court's Rules of Practice) and transmit that paper to my of-

fice. If a stipulation is forthcoming, please inform the Clerk's office immediately.

On the other hand, if you wish to persevere in the appeal, you should serve and file within ten days after this letter's date your comments in letter format justifying the retention if subject matter jurisdiction. Also please enclose a copy of each brief filed by each party in the Appellate Division, as well as a copy of the record on appeal or appendix filed in that court.

By copy of this letter, your adversary is likewise afforded the opportunity to comment in writing on the subject matter jurisdiction within the same ten day period after this letter's date.

The times within which briefs on the merits must be filed are held in abeyance during the pendency of this jurisdictional inquiry. If this sua sponte inquiry is terminated by the Court, the Clerk will notify counsel in writing and set a new schedule for the perfecting of the appeal. If you have any questions regarding this letter, you may contact the James Costello (518-455-7702) or Susan Dautel (518-455-7701).

Very truly yours,
/s/
Stuart M. Cohen

SSD/ml
cc: Hon. Eliot Spitzer

Edward VanGuilder
241 Fox Road
P.O. Box 139
North Granville, NY 12854
(518) 642-2448

December 6, 2004

Stuart M. Cohen, B.A., J.D.
CLERK OF THE COURT OF APPEALS
For the State of New York
20 Eagle Street
Albany, NY 12207-1095

Dear Hon. Clerk of the Court:

Re: *VanGuilder v. NY.* Index 6079/2004
And: Retention of Subject Matter Jurisdiction

Pursuant to your letter dated December 1, 2004, I repeat and rely upon my Notice of & Case on Appeal to establish no facts rationally can be addressed by any court before the governing law is settled because, as a matter of law alone, it determines court jurisdiction, *locus standi*, the burden of proof and the relevance of all questions of fact and equity.

This Court applied the constitutional law without regard for federal or state law in *Fellows v. Denniston*, 23 NY 420, 423, 428, 431 (1861). According to the Court Below this Court's former jurisdiction subsequently was repealed by *Oneida Indian Nation v. County of Oneida*, 44 US 661 (1974) (Oneida I). I do not yet understand and I want to try understand how that can be possible in the ab-

sence of a duly processed constitutional amendment within the meaning of *Scott v. Sandford*, 19 How. 393 (1857). I realize the Court Below merely re-iterated conventional wisdom but my question of law alone is whether the conventional wisdom is constitutional or, alternatively, skewed by 16 Stat. 566 (1871) as held by Thomas, J., in *Lara v. U.S.*, 541 US _ (2004).

Sincerely,

/s/ _____
Edward VanGuilder
Appellant (Plaintiff) Applicant
pro se

Encl.
cc:

- Solicitor General, United States of America, Room 5614, Department of Justice, 950 Pennsylvania Avenue, NW, Washington, DC 20530-0001
- Attorney General, United States of America, c/o Counsel Mark Haag, Appellate Section, Environment and Natural Resources Division, U.S. Dept. of Justice, Box 7397 – L'Enfant Plaza Station, Washington, D.C. 20026
- Solicitor General, State of New York, The Capitol, Albany, N.Y. 12224
- Attorney General, State of New York, The Capitol, Albany, N.Y. 12224-0341

From: Donna Roundpoint
[mail to: droundpoint@akwesasne.com]
Sent: Fri 8/6/2004 2:03 PM
To: James T. Meggesto
Cc: sabenedict@akwesasne.com
Subject: Council's question on release clause

A question put forward by Chief Mike Mitchell is: "Is it possible to go to court on the issue of the release clause alone, to see if we can get a ruling? And if the decision is favorable, then negotiations can resume."

The Council would like the answer to this question by Monday, so they can discuss it on Tuesday.

Thanks.

Donna

Subject: RE: Council's question on release clause
Date: Mon, 9 Aug 2004 11:33:56-0400
From: "James T. Meggesto"
<james.meggesto@sonosky.com>
To: "Donna Roundpoint" <droundpoint@akwesasne.com>
CC: "Salli Benedict" <sabenedict@akwesasne.com>

Donna, Salli:

I spoke with Harry about this and we both agree that it is not possible to go to court to get a ruling on whether it is reasonable for the state to want a global release as part of any settlement. A court would respond by stating that if the Mohawks did not want a full release, they do not have to settle.

Also, a court would also not make a ruling on what claims could be made under present law. That would be

called an "advisory opinion" and courts do not make advisory opinions because it is unconstitutional.

Salli also asked an additional question: If the Mohawks settle and withdraw their petition for judicial review of the FERC proceedings, can individual Mohawks continue to challenge the license?

The answer is no, because only the Mohawk governments intervened before FERC, and sought rehearing of the license order, only the Mohawk governments may petition for judicial review.

However, an individual has standing to challenge whether NYPA is violating a condition or term of its license.

I can continue to be reached on my cell phone (703) 946-6950 if you need anything further.

Best regards,

James Meggesto

Subject: Draft of Settlement Counter Offer
Date: Mon, 09 Aug 2004 11:39:21 -0400
From: Jim Ransom <jransom@srmt-nsn.gov>
To: "kan>>'Kanatiiosh Gray'" <kanatiiosh@aol.com>, Alex Page <apage@indianlaw.org>, "'James Meggesto'" <james.meggesto@sonosky.com>, Michele Mitchel <mmitchel@srmt-nsn,gov>, "Marsha K. Schmidt" <mks@srmt@mac.com>, Barbara Lazore <blazore@srmt-nsn,gov>, Margaret Terrance <mterrance@srmt-nsn,gov>, Emily Lauzon <elauzon@srmt-nsn,gov>, Rita Swamp <rswamp@srmt-nsn,gov>, "Ron LaFrance, Jr." <rlafrance@srmt-nsn,gov>

She:kon Everyone:

Attached for your approval to send to the State is the draft of the Settlement counter offer that I am hoping we can send this week. Please note that I still have not received the elevation language (C.3) from the State and have reserved comment on it until we see it. I have made the following changes to the settlement offer after receiving feedback:

1. On C.5, I added clarifying language to make sure the conveyance to us was by voluntary transfer, so that the change is consistent with C.1.

2. On C.6, I have broadened the lands to include our original Aboriginal territories instead of limiting ourselves to St. Lawrence and Franklin Counties. I have done this for two reasons. First, the broadness would satisfy our interest in creating a scenario whereby we would be able to acquire lands up to the 9 million acre Aboriginal claim that has been spoken about. Second, the language is broad so that it includes allowing the Tribe acquiring land in Sullivan County for gaming purposes. This would address a major concern the United States has and a major concern that the State has as well about the Sullivan County land acquisition for gaming purposes. By wording the way we have, it doesn't distinguish what purposes the land acquisitions will be for in the future, acquiring gaming lands is already an available option under the Part 151 process. Thus, it keeps gaming interests of the Tribe separate from land claims. The only way that the State and United States would support this language is if the Tribe can convince them that this is the only way to address their concerns related to Sullivan County. If we are successful, then we all benefit in that future generations will be able to make land purchase beyond this claim.

3. On C.12, I have shortened the description to just public facilities which is how the State described what the section would apply to.

Finally, Michelle sent language out to our respective lawyers on arbitration and limited waiver of sovereign immunity. We have not received a response to this language.

Comments please.

Jim

Confidential 08/09/04

Proposed Land Claims Settlement Between the State of New York and the Akwesasne Mohawks

Explanations/ Rationale

I. Understanding

1. It is the understanding of the State of New York (the "State") and the tribal plaintiffs in Civil Action Nos. 82-CV-1114, and 89-CV-829 (the "Akwesasne Mohawks) (collectively, the "Parties") that it would be mutually beneficial to resolve all Akwesasne Mohawk land claims within New York State.

2. All references to state or federal law shall mean the laws as they exist and are interpreted by state or federal courts from time to time and shall include all future changes, amendments and revisions thereto unless otherwise stated.

II. Scope of the Agreement

A. RELEASE. Except as otherwise provided in this settlement agreement, the Akwesasne Mohawks hereby release and forever discharge the State, its political subdivisions, its citizens, inhabitants, the Power Authority of the State of New York (the "Power Authority"), and any successors in interest, of and from any claim which could be brought under federal or state law at the time of the execution of this settlement agreement to land or interest in New York State.

Additional language that will ensure all Mohawk parties will participate in this settlement agreement.

1. Nothing in this agreement shall alter any treaty, statutory, contractual or aboriginal hunting, harvesting, fishing, trapping and/or gathering rights that the Akwesasne Mohawks may have; provided, however, that nothing in this settlement agreement shall be construed as diminishing, recognizing the existing the existence of, creating or conferring any such rights.

Clarification.

B. Monetary Settlement

1. The State and the United States shall each pay one half the sum of

thirty million dollars, to be paid in five equal annual payments commencing within ninety days of the effective date of settlement. Further, the Parties agree that the Power Authority shall pay the sum of two million dollars per year for thirty-five years commencing within ninety days of the effective date of this settlement agreement. The payments shall be exempt from federal or state taxation.

2. None of the payments, funds, assets or distributions set forth herein and none of the interest earned or income received on the same shall be subject to levy, execution, forfeiture, garnishment, lien, encumbrance, or seizure. None of the payments, funds, assets or distributions set forth herein and none of the interest earned or income received on the same shall at any time be used as a basis for denying or reducing funds to the Akwesasne Mohawks under any Federal, State or local program nor shall the same be deemed to be taxable, and such transfers shall not be deemed taxable events.

C. Land

Clarification to address voluntary transfer of land to the Akwesasne Mohawks.

1. Upon the effective date of the settlement, the Akwesasne Mohawks may acquire the following lands by purchase of parcels from willing sellers at fair market value or by voluntary transfer, with the understanding that boundaries for eligible parcels shall be drawn completely around such parcels so that the property may be acquired without being subdivided:

a. Land located in the Hogansburg-Bombay Triangle, as shown as "A" on the annexed map.

b. Up to 1300 acres of land ~~Land~~ in the area in the Town of Fort Covington marked as "B" on the annexed map.

c. ~~Land located in the area of the Town of Covington marked as "E" on the attached map; provided, however, that lands acquired by the Akwesasne Mohawks within such area "E" shall be held in fee unless accepted in and, absent the prior written consent of both the County and Town in which such land is located shall not be taken into trust status by the Secretary of the Inte-~~

~~rior pursuant to 25 Code of Federal Regulations Part 151. United Statesfor any purpose or otherwise considered Indian country or subject to restriction by the United States against alienation.~~

Upon further consideration, the Akwesasne Mohawks believe the community is more likely to accept the return of lands in area "E" by the process originally outlined in the MOU.

The Akwesasne Mohawks may acquire additional lands located within the claim area marked "E" on the annexed map either by purchase from willing sellers or by transfer from Akwesasne Mohawks or by voluntary transfer; provided, however, that before any such acquisition, the Akwesasne Mohawks will obtain the prior written concurrence of both the County and Town in which such land is located, such concurrence which shall not be unreasonably withheld. When such land is acquired it shall have the same status and be subject to administration by the Akwesasne Mohawks as set forth in C.5 of this settlement agreement.

***

Clarification to address voluntary transfer of land to the Ak-

5. Except as otherwise provided herein, when such lands are purchased from willing sellers or conveyed by the Power Authority to the Akwesasne Mohawks, or land

wesasne Mohawks.

conveyed to the Akwesasne Mohawks by voluntary transfer, they shall become Indian reservation land and be considered Indian country as a matter of federal law, will be subject to federal restrictions against alienation and will enjoy all of the rights and immunities, specifically including but not limited to tax immunities, attributed to Indian Reservation lands and Indian country.

Clarifying language to ensure that the Akwesasne Mohawks can use the Part 151 process to purchase lands after this settlement that are outside of the claim area and to address if the Part 151 process is changed in the future.

6. Lands within the original Aboriginal territories of the Akwesasne Mohawks acquired outside of the areas described in the preceding paragraphs of this section shall be held in fee by the Akwesasne Mohawks ~~and absent prior consultation of the State shall not be taken into trust for any purpose by the United States or otherwise considered Indian country or subject to restrictions by the United States against alienation.~~ unless accepted into trust under 25 CFR Part 151 or other federal legal procedures.

***

G. Settlement Legislation

The land claim settlement

described herein shall take effect upon the enactment of such federal and state legislation as is mutually acceptable to the Parties to effectuate the terms of this settlement agreement and, further, upon the execution of appropriate releases and other documents that may be necessary. The federal legislation ratifying the settlement agreement shall provide for resolution of disputes between or among the Parties by arbitration, with arbitration decisions to be subject to enforcement and/or vacatur in the United States District Court in accordance with the Federal Arbitration Act, 9 USC §1, *et seq.* and provide for federal court jurisdiction over actions brought to enforce or review decision issued in such arbitration proceedings.

[Insert express waivers of sovereign immunity.]

Release:

Except as otherwise provided in this agreement, the Akwesasne Mohawks hereby release and forever discharge the state, its political subdivisions, its citizens, inhabitants, the Power Authority of the State of New York (the "Power Authority"),

and any successors in interest, of and from any claim to land or interest in land in New York State, all known debts, actions, causes of action, suits and claims that have been brought in Civil Action Nos. 82-CV-783, 82-CV-1114, and 89-CV-829, and the Plaintiffs release the State of New York, its citizens, inhabitants and any successors in interest forever from such claims.

MOU Quitclaim Language

II. Land Claim Settlement....

Option 3

(a) In consideration of the benefits of this Settlement Agreement and other valuable consideration, the Plaintiffs disclaim, relinquish, and agree to the permanent extinguishment of all claims to right, interest and title of any kind in the lands described as follows:

(i) *Description of Lands to be included*

(b) The ratifying legislation shall provide for the extinguishment of the Plaintiff's claims with the following language:

(i) Congress declares that, except for the rights and interests recognized and protected in this Act, all Mohawk

claims to right, title and interest of any kind in and to the lands described in this section (a)(i) any part thereof, and property interests therein, as well as related boundary, survey, and trespass claims, therein, are hereby permanently extinguished.

(ii) Congress declares that any Mohawk claims to right, title and interest in and to Barnhart, Long Sault, and Croil Islands, [except for the rights and interests to the island recognized and protected in this Act], as well as related boundary, survey and trespass claims, therein, are hereby permanently extinguished.

(iii) As provided in this Section of the Settlement Agreement, the Plaintiffs have agreed to the relinquishment and extinguishment of those claims, rights, titles and interests extinguished pursuant to this section.

(iv) The recognition of Mohawk rights and interests in this Act constitutes consideration for the Mohawks agreement to the extinguishment of the Mohawks' claims in this section,

and it is the intent of Congress that those rights and interests may only be diminished by a future Act of Congress specifically authorizing such diminishment of such rights, with specific reference to this Act.

UNITED STATES DISTRICT COURT
NORTHERN DISTRICT OF NEW YORK

THE CANADIAN ST. REGIS BAND OF MOHAWK INDIANS, *et al.*,

Plaintiffs,

v.

5:82-CV-0783 (Lead)
5:82-CV-1114 (Member)
5:89-CV-0829 (Member)

THE STATE OF NEW YORK, *et al.*,

Defendants.

APPEARANCES:	OF COUNSEL:
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the Longhouse at Akwesasne by Mohawk Nation Counsel of Chiefs (5:89-CV-829) 601 E Street, S.E. Washington, DC 20003	ESQ.
U.S. DEPARTMENT OF JUSTICE Environmental and Natural Resources Division Indian Resources Section Attorney for Plaintiff-Intervenor United States of America (5:89-CV-829, 5:82-CV-783 & 5:82-CV-1114) L'Enfant Plaza Station P.O. Box 44378 Washington, DC 20026-4378	JAMES B. COONEY, ESQ. DAVID MORAN, ESQ.
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O. PETER SHERWOOD, ESQ.

NEAL P. MCCURN, Senior United States District Judge
GEORGE H. LOWE, United States Magistrate Judge

ORDER

Pursuant to the teleconference held by the undersigned on November 3, 2004, it is hereby **ORDERED** that the docket entry for Plaintiff St. Regis Mohawk Tribe's Motion for an Injunction Pursuant to the All Writs Act (Dkt. No. 332) shall be entered as follows:

(1) responses are due on or before **NOVEMBER 10, 2004;**

(2) any party that decides not to file a response must so advise the Court in writing on or before **NOVEMBER 10, 2004;**

(3) no replies to the responses will be permitted; and

(4) the motion is set for **NOVEMBER 12, 2004** at **1:00 P.M.** in Syracuse before the undersigned; and it is further

ORDERED that the parties must report to the undersigned in writing, either individually or jointly, on or before **DECEMBER 1, 2004**, as to the outcome of the November 27, 2004 processes concerning approval or rejection of the proposed settlement agreement; if the proposed settlement agreement is rejected, a teleconference to discuss scheduling issues shall be held on **DECEMBER 7, 2004** at **8:30 A.M.**—Ms. Schmidt to initiate the call to 315-234-8618 using AT&T or any other teleconference service, and counsel to give Ms. Schmidt timely notification of the telephone numbers at which they can be reached.

Dated: November 3, 2004
Syracuse, New York

/s/
George H. Lowe
United States Magistrate Judge